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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON AT SPOKANE

FARMERS GROUP, INC., a Nevada
Corporation,

Plaintiff,

v.

FarmersInsuranceGroupSucks.com
Admin, an individual,

Defendant.

**DEFENDANT'S REPLY
MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT**

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Table of Authorities

Cases

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I. INTRODUCTION

It is undisputed that FarmersInsuranceGroupSucks.com Admin’s website (“Gripe Site”) is non-commercial speech. As such, the Gripe Site is not subject to the strictures of the Lanham Act and receives the fullest protection afforded under the First Amendment. Farmers’ unsupportable contentions to the contrary should be rejected.

Even assuming otherwise, FarmersInsuranceGroupSucks.com Admin is still entitled to summary judgment because there is no possible likelihood that consumers will mistakenly believe that Farmers is the source or origin of the Gripe Site, which states that Farmers “SUCKS!,” includes copious criticism of Farmers, and contains no positive comments whatsoever pertaining to Farmers.

II. LAW & ARGUMENT

A. There is no genuine issue of material fact, and summary judgment is proper.

The Ninth Circuit has repeatedly upheld summary judgments in trademark cases in which there is no genuine issue of material fact. See, e.g., Surfvivor Media, Inc. v. Survivor Prods., 406 F.3d 625 (9th Cir. 2005) (affirming summary judgment of no likelihood of confusion); Karoun Dairies, Inc. v. Los Altos Food Prods., Inc., No. 03-55011, 2004 WL 1859898 (9th Cir. August 19, 2004) (same); Cohn v. Petsmart, Inc., 281 F.3d 837 (9th Cir. 2002) (same); Murray v. Cable Nat. Broad. Co., 86 F.3d 858, 860-61 (9th Cir. 1996) (same and noting that “Levi Strauss does not preclude the district court from determining likelihood of confusion as a matter of law”).

Indeed, though Farmers cites Thane Int’l, Inc. v. Trek Bicycle Corp., 305 F.3d 894 (9th Cir. 2002) for the proposition that “summary judgment is disfavored” in a trademark case, (*Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment (“Opposition”), 4*), the Ninth Circuit cites Thane for the proposition that summary judgment is proper if there is no genuine issue of material fact. Surfvivor,

1 406 F.3d at 630. Where, as here, the facts are undisputed, summary judgment is proper.

2 **B. FarmersInsuranceGroupSucks.com Admin’s Gripe Site is non-commercial**
3 **speech, outside the Lanham Act, because he did not use Farmers’ marks to sell goods**
4 **or services of any kind.**

5 As a matter of law, the Lanham Act simply does not apply in this case because
6 FarmersInsuranceGroupSucks.com Admin is not selling – *and has never sold* – any goods
7 or services through the Gripe Site. The U.S. Supreme Court held long ago that “[a] trade-
8 mark only gives the right to prohibit the use of it so far as to protect the owner’s good will
9 against *the sale of another’s product as his.*” See Prestonettes, Inc. v. Coty, 264 U.S. 359,
10 368 (1924) (emphasis added).

11 Thus, for the Lanham Act to apply, an alleged infringer must be using the trademark at
12 issue “in connection with the sale of goods or services.” Bosley Medical Institute, Inc. v.
13 Kremer, 403 F.3d 672, 676-77 (9th Cir. 2005). By contrast, the Ninth Circuit has
14 recognized that using a mark simply to communicate a message about the trademark owner
15 is outside the ambit of the Lanham Act. See Mattel, Inc. v. MCA Records, Inc.,
16 296 F.3d 894, 900 (9th Cir. 2002) (“[t]rademark rights do not entitle the owner to quash an
17 unauthorized use of the mark by another who is communicating ideas or expressing points
18 of view”). FarmersInsuranceGroupSucks.com Admin has done exactly this – communicate
19 a message about Farmers.

20 The FarmersInsuranceGroupSucks.com Admin gripe site is entitled to full First
21 Amendment protection. Commercial speech does no more than propose a commercial
22 transaction. Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1184 (9th Cir. 2001). “If
23 speech is not ‘purely commercial’ – that is, if it does more than propose a commercial
24 transaction – then it is entitled to full First Amendment protection.” Id. Speech entitled to
25 full First Amendment protection can only be curtailed if there is a “compelling interest” in
doing so and the curtailment is the “least restrictive means”

1 available. Nissan Motor Co. v. Nissan Computer Corp., 378 F.3d 1002, 1016 (9th Cir.
2 2004).

3 Farmers grudgingly acknowledges that FarmersInsuranceGroupSucks.com Admin’s
4 speech is entitled to First Amendment protection. There is no genuine issue of fact as to the
5 nature of FarmersInsuranceGroupSucks.com Admin’s speech because the Gripe Site does
6 not propose a commercial transaction. Even if some aspect of the Gripe Site can,
7 somehow, be construed as proposing such a transaction – *which it cannot* – the
8 overwhelming focus of the Site is directed to criticism of Farmers, not proposing
9 commerce. Under Hoffman, FarmersInsuranceGroupSucks.com Admin’s speech is thus
10 entitled to full First Amendment protection. Under Nissan, his speech may be curtailed
11 only if there is a “compelling interest” in doing so and the curtailment is the “least
12 restrictive means.”

13 1. Farmers incorrectly argues that “services” is interpreted broadly.

14 Farmers incorrectly relies on United We Stand Am., Inc. v. United We Stand, Am.
15 New York, Inc., 128 F.3d 86 (2d Cir. 1997) and People for the Ethical Treatment of
16 Animals v. Doughney, 263 F.3d 359 (4th Cir. 2001) (“PETA”) for the proposition that
17 “services” under 15 U.S.C. §1114(a) is interpreted broadly to bring conduct within the
18 ambit of the Lanham Act. (*Opposition, 6*). Bosley rejected this claim, criticizing PETA:

19 The PETA court’s reading of the Lanham Act would encompass almost all uses
20 of a registered trademark, even when the mark is merely being used to identify the
21 object of consumer criticism. This broad view of the Lanham Act is supported by
22 neither the text of the statute nor the history of trademark laws in this country. . . .
23 Limiting the Lanham Act to cases where a defendant is trying to profit from a
24 plaintiff’s trademark is consistent with the Supreme Court’s view that “[a
25 trademark’s] function is simply to designate the goods as the product of a
particular trader and to protect his good will against the sale of another’s product
as his.”

24 403 F.3d at 679. Commenting on United We Stand, Bosley correctly recognized that the
25 proper focus is on whether the gripe site offers competing services for sale:

1 [T]he appropriate inquiry is whether Kremer offers competing services to the
2 public. Kremer is not Bosley's competitor; he is their critic. His use of the
3 Bosley mark is not in connection with a sale of goods or services – it is in
connection with the expression of his opinion about Bosley's goods and
services.

4 Id. (emphasis added). FarmersInsuranceGroupSucks.com Admin does not offer competing
5 services through the Gripe Site – he does not “offer” anything through the Gripe Site. All
6 he does is gripe. Like the Defendant in Bosley, FarmersInsuranceGroupSucks.com Admin
7 is not Farmers' competitor; he is Farmers' critic. The Gripe Site does not constitute a
8 commercial use of any of Farmers' marks.

9 2. Hyperlinking to other insurers' websites was not commercial use because
10 FarmersInsuranceGroupSucks.com Admin did not propose a commercial transaction
11 between himself and customers.

12 Commercial speech is “expression related *solely to the economic interests* of the
13 speaker and its audience.” Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New
14 York, 447 U.S. 557, 561 (1980) (emphasis added); Hoover v. Morales, 164 F.3d 221, 225
15 (5th Cir. 1998) (noting that the “defining element” of commercial speech is concern for
16 “economic interests of the speaker and its audience.”); ForSaleByOwner.com Corp. v.
17 Zinnemann, 347 F. Supp. 2d 868, 876 (E.D. Cal. 2004) (holding that real estate data on
18 website was not commercial because website “does not propose or encourage a direct sales
19 transaction between *itself* and a prospective real estate purchaser”) (emphasis added).

20 Here, it is undisputed that FarmersInsuranceGroupSucks.com Admin's hyperlinks to
21 other insurers' websites did not propose a commercial transaction between
22 ***FarmersInsuranceGroupSucks.com Admin*** and prospective customers. It is also
23 undisputed that FarmersInsuranceGroupSucks.com Admin has neither entered into any
24
25

1 “Affiliate Agreement”¹ with any insurers nor does he receive a pecuniary benefit from
2 placing links on the Gripe Site. FarmersInsuranceGroupSucks.com Admin included these
3 links to inform web users about alternatives to Farmers and not for financial gain. The text
4 of the Gripe Site that appeared before the links, *which Farmers fails to quote*, shows that
5 FarmersInsuranceGroupSucks.com Admin’s purpose was not commercial:

6 If you currently use Farmers I would recommend you drop them as soon as
7 possible, especially before you need to file a claim! I would recommend any of
8 the following companies below, I am sure they will offer you cheaper insurance,
9 but most off[sic] all they won’t take advantage of you or try and rip you off when
you file a claim. I am not an employee of any of these companies nor do I get any
sort of commission if you purchase their products. Call for a free quote, it will
only take a minute! :)

10 (*Farmers’ Statement of Fact (“FSOF”), Att. 2, (Ex. 1 to*
11 *FarmersInsuranceGroupSucks.com Admin Deposition)*). As a matter of law, the hyperlinks
12 in question did not render the Gripe Site commercial because
13 FarmersInsuranceGroupSucks.com Admin was not proposing any transaction between
14 himself and a third party.²

15
16 3. The alleged “Enterprise” does not make the Gripe Site commercial when
17 FarmersInsuranceGroupSucks.com Admin never engaged in the Enterprise, or any related
18 commerce.

19 FarmersInsuranceGroupSucks.com Admin does not dispute that, after Farmers

20 ¹ An “Affiliate Agreement” is a common contract in the online world under which an
21 advertiser pays a third-party to include a link to the advertiser’s website on the third-party
22 site. The third-party site operator is often paid for the number of “click throughs” to the
23 advertiser’s site or the revenue from sales arising therefrom. (*SOF 2, ¶ 28, Att. 18*).

24 ² In fact, these hyperlinks were removed sometime between November 3, 2004 and
25 November 17, 2004, (*SOF 2, ¶¶ 30-31, Att. 20-21*), even before this suit was filed, and have
never reappeared on the Gripe Site.

1 attempted to shut down his Gripe Site by improperly threatening his Internet Service
2 Provider at the time, FarmersInsuranceGroupSucks.com Admin expressed his intent to
3 activate an “Enterprise,” which would broaden the Gripe Site to be a general consumer
4 advocacy site, not limited to Farmers, to allow donations, and to sell t-shirts. (*FSOF, Att. 2,*
5 *(Ex. 1 to FarmersInsuranceGroupSucks.com Admin Deposition)*).

6 Nonetheless, FarmersInsuranceGroupSucks.com Admin’s desire to launch the
7 “Enterprise” did not constitute commercial use of any Farmers marks because it was never
8 launched and FarmersInsuranceGroupSucks.com Admin’s statements were made in
9 response to Farmers’ self-help attempt to silence him. FarmersInsuranceGroupSucks.com
10 Admin never broadened the content of the site. He never sold a single t-shirt or any other
11 product or service. (*Defendant’s Supplemental Statement of Undisputed Material Facts*
12 *(“SOF 2”), Att. 19, (FarmersInsuranceGroupSucks.com Admin Deposition, 47:10-20)*).

13 Notwithstanding Farmers’ assertion to the contrary,
14 FarmersInsuranceGroupSucks.com Admin’s registration of domains for
15 farmersinsurancegroupsucks.com and boycottfarmersinsurance.com is not an activation of
16 the “Enterprise.” FarmersInsuranceGroupSucks.com Admin activated these shortly before
17 his deposition to avoid any changed circumstances by which Farmers could attempt to
18 justify a second deposition. He did not hide this fact at deposition and volunteered the
19 registration when asked. (*SOF 2, Att. 19 (FarmersInsuranceGroupSucks.com Admin*
20 *Deposition, 33:14-16)*). That FarmersInsuranceGroupSucks.com Admin used an
21 anonymous registration service is irrelevant. It is the nature of the Gripe Site that is at
22 issue, not its author.

23 Moreover, even if FarmersInsuranceGroupSucks.com Admin had attempted to hide
24 the registration, that does not change the fact that registering a domain name that includes a
25 third-party mark is not commercial use. See Lockheed Martin Corp. v. Network Solutions,

1 Inc., 985 F. Supp. 949, 957 (C.D. Cal. 1997) (stating “registration of a domain name,
2 without more, does not constitute use of the name as a trademark”), aff’d, Lockheed Martin
3 Corp. v. Network Solutions, Inc., 194 F.3d 980 (9th Cir. 1999). Farmers has offered no
4 evidence to the contrary.

5
6 4. FarmersInsuranceGroupSucks.com Admin’s offer to refrain from future criticism
7 of Farmers for payment of money he believed was rightfully owed to him does not make
8 the Gripe Site commercial.

9 Contrary to Farmers’ argument, the facts here are not “analogous to the facts in
10 Panavision Int’l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998).” The Panavision
11 Defendant’s conduct was proscribed because he had made a business of usurping corporate
12 trademark owners ability to register their marks as domain names:

13 Toeppen’s “business” is to register trademarks as domain names and then sell
14 them to the rightful trademark owners. He acts as a “spoiler,” preventing
15 Panavision and others from doing business on the Internet under their
16 trademarked names unless they pay his fee . . . he curtailed Panavision’s
17 exploitation of the value of its trademarks on the Internet, a value which Toeppen
18 then used when he attempted to sell the Panavision.com domain name to
19 Panavision.

20 Panavision, 141 F.3d at 1325. None of these facts are present here. By contrast,
21 FarmersInsuranceGroupSucks.com Admin is not engaged in any business of any kind,
22 much less the business of selling trademark domain names to the trademark’s rightful
23 owner. Moreover, FarmersInsuranceGroupSucks.com Admin does not act as a “spoiler”
24 and certainly does not prevent Farmers “from doing business on the Internet under [its]
25 trademarked name unless [it] pays his fee.” Id.

This case is nothing like Panavision. Farmers’ protestations to the contrary are
misleading and nothing more than a desperate attempt to avoid summary judgment without
any factual basis. Indeed, Bosley rejected the very argument that using a gripe site as part

1 of an alleged “extortion scheme”³ satisfied the Lanham Act’s commercial use requirement.
2 403 F.3d at 678. FarmersInsuranceGroupSucks.com Admin’s demand for money he
3 believed he was owed is not commercial use of Farmers’ marks.

4
5 5. Placing Farmers’ marks in metatags is not a commercial use when the metatags
6 were used for the purpose of FarmersInsuranceGroupSucks.com Admin voicing his
7 dissatisfaction with Farmers.

8 Relying on Brookfield Communications, Inc. v. W. Coast Entertainment Corp.,
9 174 F.3d 1036 (9th Cir. 1999), Farmers incorrectly contends that
10 FarmersInsuranceGroupSucks.com Admin’s inclusion of Farmers’ marks in metatags
11 somehow distinguishes this case from other gripe site cases. (*Opposition*, 7). Brookfield
12 states that, *in a commercial context*, including a competitor’s marks in metatags may be
13 infringing. 174 F.3d at 1065. But, as the court recognized in Bally Total Fitness Corp. v.
14 Faber, 29 F. Supp. 2d 1161 (C.D. Cal. 1998), metatags are not infringing when included in
15 consumer commentary. Without the metatags, the consumer commentary would be hidden
16 from Internet search engines, and the cybergriper would be like the proverbial tree falling in
17 the forest, making a sound that no one could hear. Although Farmers pays lip service to
18 FarmersInsuranceGroupSucks.com Admin’s First Amendment right to free speech, it does
19 not want anyone to hear him.

20 ³ For avoidance of doubt, FarmersInsuranceGroupSucks.com Admin’s conduct was not
21 extortion. See State v. Pauling, 108 Wn. App. 445, 453, 31 P.3d 47, 51-52 (2001) (noting
22 that consumer’s threat to, if vendor refused to refund money owed, report vendor to the
23 attorney general, the Better Business Bureau, and a local consumer advocate appears to be
24 “reasonable and protected speech”) rev’d on other grounds, 149 Wn. 2d 381, 69 P.3d 331
25 (2003).

1 6. Michigan State University allegedly asking FarmersInsuranceGroupSucks.com
2 Admin’s to shut down his website does not make his inclusion of Farmers’ marks on the
3 Gripe Site a commercial use.

4 Farmers incorrectly contends that the actions of FarmersInsuranceGroupSucks.com
5 Admin’s prior Internet Service Provider, Michigan State University (“MSU”), in asking
6 FarmersInsuranceGroupSucks.com Admin to remove his website also distinguishes this
7 case from other gripe site cases. (*Opposition*, 7). There is no admissible evidence as to
8 what MSU allegedly did. Moreover, MSU is not a court. There is no evidence that the
9 individual from MSU who allegedly reviewed FarmersInsuranceGroupSucks.com Admin’s
10 Gripe Site was a lawyer, a judge, or otherwise had any working knowledge of the Lanham
11 Act. About the most that could arguably be inferred from this inadmissible “evidence” is
12 that MSU determined that FarmersInsuranceGroupSucks.com Admin’s Gripe Site violated
13 MSU’s internal policies. Even if that can be inferred, though, that certainly does not make
14 FarmersInsuranceGroupSucks.com Admin’s Gripe Site commercial.

15 7. Taubman, Nissan, and Bosley stand only for the proposition that links which
16 invite commerce *with the speaker* may render a website commercial.

17 Farmers misrepresents Taubman, Nissan, and Bosley and distorts their analyses to
18 support its position that “placement on FarmersInsuranceGroupSucks.com Admin’s
19 website of links to Farmers’ competitors is alone sufficient to satisfy the commercial use
20 requirement.” (*Opposition*, 9). Farmers argues that placing any links on a gripe site to a
21 commercial site renders the gripe site commercial. Farmers’ approach ignores critical facts
22 in, and the language of, Taubman, Nissan, and Bosley.

23 For example, though Taubman held that links to commercial websites constituted
24 commercial use of Plaintiff’s mark related to “advertising of the goods”, 319 F.3d at 775,
25 this was because the links were to businesses *owned by Defendant and his girlfriend*, see
id. at 772 (stating that the site “contain[ed] a link to the website of a company run by

1 Mishkoff’s girlfriend . . . and to Mishkoff’s site for his web design business”). Similarly,
2 the Ninth Circuit found links on the Nissan Defendant’s site problematic because they led
3 to advertising controlled by Defendant:

4 Nissan Computer posted a link on nissan.com and nissan.net . . . which contained
5 links via banner advertising, including a link to a site operated by The Internet
6 Center (TIC), which had auto-related advertising. ***TIC was owned and operated
by [the Defendant].***

7 Nissan, 378 F.3d at 1008 (emphasis added). Farmers’ most egregious distortion is its
8 reliance on the Ninth Circuit’s recent Bosley opinion, which it takes out of context.
9 Farmers relies on the language “[t]here are no links to any of Bosley’s competitors’
10 websites” as supporting its position that links to Farmers’ competitors, without more,
11 constitutes commercial use. (*Opposition, 9-10*). The Ninth Circuit rejected this exact
12 argument in Bosley:

13 [Bosley] argues that a mark used in an otherwise noncommercial website . . . is
14 nonetheless used in connection with goods and services where a user can click on
15 a link available on that website to reach a commercial site. Nissan Motor Co. v.
Nissan Computer Corp., 378 F.3d 1002 (9th Cir. 2004). However, Bosley’s
reliance on Nissan is unfounded.

16 403 F.3d at 677. Although Bosley does state that Defendant’s site contained no
17 commercial links, this must be read in context with the language shortly thereafter: “[a]t no
18 time did Kremer’s BosleyMedical.com site offer for sale any product or service or contain
19 paid advertisements from any other commercial entity.” Id. at 678. Farmers’ contention
20 that Bosley supports its position is patently inconsistent with what Bosley actually says.

21 Bosley’s analysis clarifies that the site at issue was deemed non-commercial in part
22 because of the lack of links to any business websites ***owned, controlled, or operated by the
23 Defendant.*** Here, it is undisputed that ***none*** of the links on
24 FarmersInsuranceGroupSucks.com Admin’s Gripe Site are to businesses owned,
25 controlled, or in any way associated with FarmersInsuranceGroupSucks.com Admin.

1 These links do not make FarmersInsuranceGroupSucks.com Admin’s website commercial.

2 8. Prohibiting all links to commercial sites from non-commercial “gripe sites” would
3 unreasonably hamper speech.

4 As a matter of policy, this Court should reject Farmers’ assertion that merely including
5 hyperlinks to commercial websites makes a gripe site “commercial.” Were the Court to
6 accept this, which ignores whether the cybergriper was proposing a commercial transaction
7 on its own behalf, *any* speech about a company that includes *any* references to that
8 company’s competitors is arguably “commercial.”

9 Moreover, such a *per se* rule would be incredibly overbroad and would curtail vast
10 amounts of otherwise fully-protected speech. For example, it cannot be disputed that major
11 U.S. newspapers – the Wall Street Journal, the New York Times, and the Seattle Times,
12 just to name a few – are for-profit businesses. All of these newspapers have websites. All
13 of these websites contain copious advertisements, including ads for financial services and
14 insurance companies. (*SOF 2, Att. 16*). Were the Court to embrace the *per se* bar Farmers
15 requests, a gripe site could never safely link to a newspaper article without concern that
16 such a link would render the site “commercial.”⁴ This, too, would significantly hinder a
17 speaker’s ability to communicate informational via hyperlinking to newspapers and other
18 news websites. *Cf. Bally*, 29 F. Supp. 2d at 1168 (stating “[t]he essence of the Internet is
19 that sites are connected to facilitate access to information”).

20 What FarmersInsuranceGroupSucks.com Admin previously did by including
21

22 _____
23 ⁴ This conduct would not be immunized by the Ninth Circuit’s comment in *Bosley* that
24 links to a “discussion” site that includes advertising is too attenuated to constitute
25 commercial use. This is because, unlike “discussion” sites, which are often operated on a
non-profit basis, major newspapers and their websites are for-profit enterprises.

1 hyperlinks is the Web-equivalent of FarmersInsuranceGroupSucks.com Admin standing
2 outside of Farmers' headquarters and handing out information to passers-by about
3 alternative insurers. That FarmersInsuranceGroupSucks.com Admin has simply
4 accomplished this through a different medium is irrelevant under the First Amendment.
5 His speech is purely informational, non-commercial, and fully deserving of First
6 Amendment protection.

7
8 **C. Even if something on FarmersInsuranceGroupSucks.com Admin's Gripe Site**
9 **constitutes commercial use of Farmers' marks, FarmersInsuranceGroupSucks.com**
10 **Admin still did not infringe any such marks.**

11 Even if the content of FarmersInsuranceGroupSucks.com Admin's Gripe Site
12 somehow amounts to commercial use of Farmers' marks, *which it does not*, there is no
13 "likelihood of confusion" that consumers would somehow believe that Farmers is the
14 source or origin of the Gripe Site. With no likelihood of confusion, there can be no
15 infringement as a matter of law.

16 To assess likelihood of confusion, the Court examines eight factors: (1) strength of the
17 mark; (2) proximity of services; (3) similarity of marks; (4) evidence of actual confusion;
18 (5) marketing channels; (6) type of services and likely degree of purchaser care;
19 (7) defendant's intent; and (8) likelihood of expansion of the product lines. See AMF Inc.
20 v. Sleekcraft Boats, 599 F.2d 341, 348-49 (9th Cir. 1979).

21 No one factor is determinative or necessary to support a finding of likely confusion.
22 See E&J Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1290-91 (9th Cir. 1992).
23 Likelihood of confusion is not determined by mechanically considering the number of
24 Sleekcraft factors favoring either party, or by giving the same weight to a given factor
25 across cases. Entrepreneur Media, Inc. v. Smith, 279 F.3d 1135, 1141 (9th Cir. 2002);
Thane, 305 F.3d 894, 901 (9th Cir. 2002) (noting that "list of factors is not a score-card –

1 whether a party ‘wins’ a majority of the factors is not the point”). In an online context, the
2 most important Sleekcraft factors are: (1) similarity of marks; (2) the relatedness of
3 services; and (3) the parties’ simultaneous use of the Web as a marketing channel.
4 Interstellar Starship Serv., Ltd. v. Epix, Inc., 304 F.3d 936, 942 (9th Cir. 2002).

5 1. Under Sleekcraft and Bally, there is no possible likelihood of confusion.

6 **a. Strength of the mark.**

7 Farmers has not demonstrated that its mark is strong. As discussed *infra*,
8 Section (II)(c)(2), there are over 200 federally-registered marks that include the word
9 “FARMERS” in whole or in part, which are not owned by Farmers. (*SOF 2*, ¶ 27, *Att. 17*).
10 This suggests that Farmers is not a strong mark and there is no evidence to the contrary.

11 **b. Proximity of the goods or services.**

12 The proximity of the parties’ services are fundamentally different. Farmers incorrectly
13 asserts that “[t]he services offered by the parties are identical – the promotion of insurance
14 products and services.” (*Opposition, 15*). Bally rejected an identical argument, stating:

15 The Court finds that Faber’s site does not compete with Bally’s site. It is true that
16 both sites provide Internet users with the same service – information about Bally.
17 These sites, however, have fundamentally different purposes. Bally’s site is a
18 commercial advertisement. Faber’s site is a consumer commentary. Having such
19 different purposes demonstrates that these sites are not proximately competitive.
20 Therefore, this factor cuts against Bally.

21 Bally, 29 F. Supp. 2d at 1164. Just like the website in Bally,
22 FarmersInsuranceGroupSucks.com Admin’s Gripe Site contains “consumer commentary”,
23 which is “fundamentally different” than Farmers’ commercial exploitation of its marks.
24 See id. This factor favors FarmersInsuranceGroupSucks.com Admin.

25 **c. Similarity of the marks.**

1 The marks used are certainly not, as Farmers claims, “identical or nearly identical.”⁵
2 (*Opposition, 15*). Bally also rejected an identical argument on this factor, stating:

3 “Sucks” has entered the vernacular as a word loaded with criticism. Faber has
4 superimposed this word over Bally’s mark. It is impossible to see Bally’s mark
5 without seeing the word “sucks.” Therefore, the attachment [of the word “sucks”]
6 cannot be considered a minor change. This factor cuts against Bally.

7 Bally, 29 F. Supp. 2d at 1164 (internal citation omitted). As in Bally,
8 FarmersInsuranceGroupSucks.com Admin has emblazoned “Sucks!” across Farmers’ logo,
9 which appears on the top of the Gripe Site. (*FSOF, Att. 2 (Exhibit 3 to*
10 *FarmersInsuranceGroupSucks.com Admin Deposition)*). It is impossible for any visitor to
11 the Site to see Farmers’ logo without seeing “Sucks!” This factor favors
12 FarmersInsuranceGroupSucks.com Admin.

13 **d. Evidence of actual confusion.**

14 Farmers has failed to produce any evidence of confusion that is actionable under the
15 Lanham Act. Survey evidence is “often the most persuasive evidence” in establishing the

16 ⁵ Farmers also contends that “SUCKS!” was not emblazoned across a representation of
17 Farmers’ logo. (*Opposition, 15*). The majority of deposition exhibits that Farmers cites in
18 support of this contention either include the logo with “SUCKS!” across it, (*Farmers SOF,*
19 *Att. 2 (Exhibits 3 and 5 to FarmersInsuranceGroupSucks.com Admin Deposition)*); or do
20 not include the logo at all, (*Farmers SOF, Att. 2 (Exhibits 13, 14, and 16 to*
21 *FarmersInsuranceGroupSucks.com Admin Deposition)*). Farmers does cite to one version
22 of the logo which, instead of “SUCKS!” states “Farmers Insurance Sucks!” on the shield,
23 with the words “Symbol of Terrible Service” immediately below. (*Farmers SOF, Att. 2*
24 *(Exhibit 1 to FarmersInsuranceGroupSucks.com Admin Deposition)*). This alternative
25 form is no more susceptible of confusing consumers than the alternative form currently on
the Gripe Site.

1 likelihood of confusion. Cairns v. Franklin Mint Co., 24 F. Supp. 2d 1013, 1041 (C.D. Cal.
2 1998). Failing to present evidence of actual confusion “warrants a presumption that the
3 results would have been unfavorable.” Playboy Enters., Inc. v. Netscape Communications
4 Corp., 55 F.Supp. 2d 1070, 1084 (C.D. Cal. 1999); see also, PEI v. Welles,
5 7 F. Supp. 2d 1098, 1104 (S.D. Cal. 1998) (stating “[PEI] has presented no empirical
6 evidence to show that there is actual confusion among consumers. Though not necessary,
7 the lack of any such demonstration weighs in defendant’s favor.”), aff’d without opinion,
8 162 F.3d 1169 (9th Cir. 1998). Here, Farmers has produced no survey evidence of actual
9 confusion and its failure to do so “warrants a presumption that the results would have been
10 unfavorable.” See Playboy Enters., 55 F. Supp. 2d at 1084.

11 The only “evidence” of “actual confusion” proffered by Farmers is confusion that is
12 simply not actionable under the Lanham Act. Farmers alleges that the facts that
13 “consumers who contacted FarmersInsuranceGroupSucks.com Admin indicated that they
14 came across his website after attempting to find Farmers on the Internet” and “persons were
15 confused by misleading statements or omissions on FarmersInsuranceGroupSucks.com
16 Admin’s website as to whether FarmersInsuranceGroupSucks.com Admin was a Farmers
17 insured” are probative of actual, **actionable** confusion. (*Opposition, 18*).

18 Even if consumers looking for Farmers actually found
19 FarmersInsuranceGroupSucks.com Admin’s website first, and even if consumers were
20 actually confused regarding whether FarmersInsuranceGroupSucks.com Admin was
21 insured by Farmers, **this is irrelevant as a matter of law**. As the Ninth Circuit has
22 recognized, trademark infringement law “protects only against mistaken **purchasing**
23 **decisions** and not against confusion generally.” Bosley, 40 F.3d at 677 (emphasis in
24 original).

25 The complete lack of evidence of actual confusion regarding purchasing decisions is

1 not surprising – FarmersInsuranceGroupSucks.com Admin is not *selling* anything.
2 Moreover, no reasonable user of a website prominently displaying “Farmers Insurance
3 Group Sucks,” “Avoid Farmers Insurance,” “This site is unauthorized by Farmers
4 Insurance Group,” and including Farmers’ logo with “Sucks!” across it – in large, bold, red
5 font – could ever believe that the source of the website was Farmers. The Bally court came
6 to a similar conclusion:

7 Faber’s states that his site is “unauthorized” and he has superimposed the word
8 “sucks” over Bally’s mark. *The Court finds that the reasonably prudent user
would not mistake Faber’s site for Bally’s official site.*

9 Bally, 29 F. Supp. 2d at 1164 (emphasis added). Likewise, Taubman easily found use of
10 “sucks” in a domain name precluded any possible confusion:

11 In contrast, “taubmansucks.com” removes any confusion as to source. We find
12 no possibility of confusion and no Lanham Act violation.

13 Taubman, 319 F.3d at 778. As in Bally, this factor cuts against Farmers and favors
14 FarmersInsuranceGroupSucks.com Admin.

15 e. Marketing channels used.

16 There is no significant overlap in marketing channels. Farmers alleges that both it and
17 FarmersInsuranceGroupSucks.com Admin use the same marketing channels – the Internet.
18 (*Opposition, 16*). FarmersInsuranceGroupSucks.com Admin does not market anything.
19 He has no business. He sells no products or services. The only channel through which
20 FarmersInsuranceGroupSucks.com Admin publishes his criticism of Farmers is the
21 Internet. Farmers, on the other hand, advertises its products in multiple forms of media.

22 Even if merely hosting a gripe site is use of a “marketing channel,” there is no
23 evidence of any overlapping channels other than the Internet. Bally found similar facts “at
24 best, neutral, and likely cuts against [the plaintiff],” stating:

25 Bally’s goods and Faber’s goods are not related. *Therefore, the fact that*

1 *marketing channels overlap is irrelevant.*

2 Bally, 29 F. Supp. 2d at 1164-65 (emphasis added). As in Bally, this factor is at least
3 neutral and likely favors FarmersInsuranceGroupSucks.com Admin.

4 **f. Type of goods and the degree of care exercised by purchaser.**

5 A buyer of expensive goods can be expected to exercise greater purchasing care. See
6 Sleekcraft, 599 F.2d 341, 353. Confusion is thus less likely with trademarks used on
7 automobiles than with trademarks used on candy bars, all other factors being equal; a buyer
8 spending \$50,000 is more careful than a buyer spending fifty cents.

9 Farmers provides insurance and financial services under the marks at issue. In its own
10 advertising, Farmers asserts the importance of using care to select such products.⁶
11 (*Defendant’s Statement of Undisputed Material Facts (“SOF”), Att. 15 (Responses to*
12 *Requests for Admission Nos. 108, 111)*). Moreover, Bally found that this factor favored
13 defendant when the site stated it was “unauthorized” and “not Bally’s official site.”
14 29 F. Supp. 2d at 1165.

15 As Farmers’ advertising suggests, consumers of insurance and financial services do
16 *and should* exercise great care when buying such products. Further, the top of
17 FarmersInsuranceGroupSucks.com Admin’s Gripe Site contains the bold text “**This site is**
18 **unauthorized by Farmers Insurance Group.**” This factor strongly favors
19 FarmersInsuranceGroupSucks.com Admin.

20 **g. Defendant’s intent in selecting the mark.**

21 There is no evidence that remotely suggests FarmersInsuranceGroupSucks.com
22 Admin was trying to “palm off” any products or services of any kind. Farmers alleges that
23 FarmersInsuranceGroupSucks.com Admin has “intentionally sought to cause confusion
24

25 _____
⁶ Interestingly, Farmers does not discuss this factor.

1 among consumers searching for Farmers on the Internet” and engaged in other allegedly
2 nefarious acts. (*Opposition*, 16). In support, Farmers relies upon declarations of its
3 “expert” and an employee, neither of whom have personal – *or any other* – knowledge of
4 FarmersInsuranceGroupSucks.com Admin’s intent. (*Id.*). These declarations are not
5 probative of intent.

6 Assuming *arguendo* that FarmersInsuranceGroupSucks.com Admin engaged in all of
7 the acts alleged by Farmers, his conduct is still not actionable under the Lanham Act. The
8 relevant inquiry is whether the alleged infringer intended to “palm off” his products as
9 those of another. See, e.g., Harper House, Inc. v. Thomas Nelson, Inc., 889 F.2d 197, 208
10 (9th Cir. 1989). FarmersInsuranceGroupSucks.com Admin has no products, and no
11 services, to market.

12 Even if FarmersInsuranceGroupSucks.com Admin intended to confuse consumers into
13 believing that he was a Farmers’ insured, that is legally irrelevant to any intent to confuse
14 consumers into believing that Farmers was the source or origin of his Gripe Site or its
15 content. Moreover, even if he sought to mask his identity in his speech, this right is well-
16 settled in First Amendment jurisprudence. McIntyre v. Ohio Elections Com’n,
17 514 U.S. 334, 341 (1995) (stating “an author generally is free to decide whether or not to
18 disclose his or her true identity”).

19 As to any alleged intent to harm Farmers financially, the focus of a “gripe site” or any
20 other consumer commentary is to criticize a product or business. As the Sixth Circuit
21 recognized in Taubman, there is absolutely nothing wrong with that:

22
23 And although economic damage might be an intended effect of Mishkoff’s
24 expression, the First Amendment protects critical commentary when there is no
confusion as to source, even when it involves the criticism of a business. Such
use is not subject to scrutiny under the Lanham Act.

25 Taubman, 319 F.3d at 778. Farmers has offered nothing to the contrary.

1 It is undisputed that FarmersInsuranceGroupSucks.com Admin intentionally
2 referenced Farmers' marks to publish critical comments about Farmers.
3 FarmersInsuranceGroupSucks.com Admin did not, however, intend to confuse consumers
4 regarding the source or origin of those comments. Indeed, no reasonable person could
5 believe that FarmersInsuranceGroupSucks.com Admin intentionally placed terms such as
6 "Avoid Farmers Insurance Group," "Farmers Insurance Group Sucks," and other pejorative
7 language on his Gripe Site to cause consumers to believe that Farmers was the originator or
8 sponsor of these criticisms.

9 Moreover, as Bally recognized, it is impossible to publish critical comments without
10 referring to the target by name:

11 Faber, however, is exercising his right to publish critical commentary about Bally.
12 He cannot do this without making reference to Bally. In this regard, Professor
13 McCarthy states:

13 The main remedy of the trademark owner is not an injunction to
14 suppress the message, but a rebuttal to the message. As Justice
15 Brandeis long ago stated, "If there be time to expose through discussion
the falsehood and fallacies, to avert the evil by the process of education,
the remedy to be applied is more speech, not enforced silence."

16 Bally, 29 F. Supp. 2d at 1165-66 (citing J. Thomas McCarthy, MCCARTHY ON
17 TRADEMARKS AND UNFAIR COMPETITION ("MCCARTHY") § 31:148 (4th ed. 1996).
18 Following Bally, this factor favors FarmersInsuranceGroupSucks.com Admin.

19 **h. Likelihood of expansion of the product lines.**

20 Farmers admits that it has never offered, and has no plans to offer, a service in
21 commerce of publishing complaints about Farmers. (*SOF, Att. 15 (Responses to Requests*
22 *for Admission Nos. 92, 93)*). There is no evidence that FarmersInsuranceGroupSucks.com
23 Admin is in or is going into the insurance business. This factor favors
24 FarmersInsuranceGroupSucks.com Admin.

25 2. There is no possibility of actionable initial interest confusion because

1 FarmersInsuranceGroupSucks.com Admin and Farmers do not compete and the word
2 “FARMERS” is a common term.

3 Farmers incorrectly contends that the Gripe Site causes initial interest confusion,
4 apparently because FarmersInsuranceGroupSucks.com Admin wanted consumers to find
5 his site while looking for Farmers. (*Opposition*, 16-17). The Ninth Circuit rejected this
6 argument in Interstellar Starship. In that case, Epix, a game manufacturer, alleged that use
7 of www.epix.com by Interstellar Starship Services (“ISS”), a provider of computer graphics
8 design services, caused initial interest confusion. Interstellar Starship, 304 F.3d at 939.
9 The Epix court first noted that all third-party use of a mark in a domain name does not
10 generate initial interest confusion:

11 Contrary to Epix’s contentions and, as a matter of law, all uses of
12 www.epix.com do *not* generate initial interest confusion with the EPIX
13 mark. In a similar case, the First Circuit rejected Epix’s basic
14 contention. It held that use of the domain name www.clue.com for
15 computer services did not infringe Hasbro’s trademark on the board
16 game Clue. Hasbro Inc. v. Clue Computing, Inc., 232 F.3d 1, 2
17 (1st Cir. 2000). The Clue court found no initial interest confusion
18 because the companies’ products were disparate, and there was no
19 evidence of actual confusion.

20 Id. at 943(emphasis in original). The court then discussed a hypothetical apple grower
21 registering a truly famous mark, DRSEUSS, as a domain. Id. Such adoption would likely
22 lead to initial interest confusion, even with disparate products, because “[m]arks of renown,
23 like DR. SEUSS, describe the source of only one company’s products, and the apple
24 grower’s adoption of the www.DRSEUSS.com domain name inevitably trades on the
25 favorable cachet associated with that company. . .” Id. at 943-44.

26 The same apple grower could register www.apple.com, however, and no initial interest
27 confusion would result because, although APPLE may be a famous mark, it is also a
28 common noun used by hundreds of companies according to the website of the United
29 States Patent and Trademark Office (“PTO”):

1 Although APPLE is a famous registered trademark of Apple
2 Computer, Inc., many other companies also use the term APPLE to
3 describe a variety of products. Indeed, the apple distributor probably
4 does not infringe Apple Computer's mark because APPLE is also a
5 common noun, used by many companies, and the goods offered by
6 these two companies differ significantly.

7 Id. at 944 (footnote omitted). On the facts before it, the use of www.epix.com by ISS was
8 more like the second example. Id. at 945. At least eight companies had registered EPIX or
9 a close variation with the PTO. Id. EPIX was also in widespread use online. Id. As the
10 parties' products were different, and EPIX was not associated with just one company, a
11 consumer accessing epix.com and finding ISS's website would merely conclude – correctly
12 – that more than one company used EPIX in commerce. Id. at 946.

13 The facts here are similar to the second Interstellar Starship example. There is no
14 similarity between the parties' services. Section (II)(C)(1)(b), *supra*. Also, the PTO
15 website reports that "FARMERS" is, in whole or in part, included in over 200 marks not
16 owned by "Farmers Group."⁷ (*SOF 2*, ¶ 27, *Att. 17*). Moreover, like APPLE (and unlike
17 DR. SEUSS), "FARMER" is a common noun. As such, even had
18 FarmersInsuranceGroupSucks.com Admin registered a Farmers' mark as a domain name,
19 there would be no likelihood of initial interest confusion. Because he instead registered
20 pejorative forms of the mark – boycottfarmersinsurance.com and
21 farmersinsurancegroupsucks.com – there is simply no likelihood of even momentary
22 consumer confusion regarding the source or origin of FarmersInsuranceGroupSucks.com
23 Admin's Gripe Site.

24 **D. FarmersInsuranceGroupSucks.com Admin's motion is for total, not partial,**

25 ⁷ To be sure, this is why it was frivolous for Farmers to allege infringement of 10 of the 13
marks asserted. As Farmers acknowledges, the only common element of these marks is
"Farmers," and Farmers clearly does not have a monopoly on the word "Farmers."

1 **summary judgment, including summary judgment on Farmers’ dilution claim.**

2 The Federal Trademark Dilution Act (“FTDA”), 15 U.S.C. §1125(c), extends dilution
3 protection only to those whose mark is a “household name.” Nissan, 378 F.3d at 1011. A
4 mark used by an alleged diluter must be identical, or nearly identical, to the protected mark
5 for a dilution claim to succeed. Id. Commercial use is an essential element of a dilution
6 claim. Id. at 1010. Noncommercial use is excepted. Id. (citing 15 U.S.C. §1125(c)(4)(B)).

7 When a mark is in widespread use, it may not be famous for the products of one
8 business. Id. That unaffiliated companies use a mark in their names is probative of the fact
9 that the mark is not eligible for dilution protection. See id. (citing Avery Dennison Corp. v.
10 Sumpton, 189 F.3d 868, 878 (9th Cir. 1999) (noting that widespread use of a mark in the
11 name of other companies makes fame unlikely). Moreover, actual dilution must be shown
12 for a dilution claim to succeed. Moseley v. V Secret Catalogue, 537 U.S. 418, 433 (2003).

13 The word “FARMERS” is in widespread use by companies other than Farmers. Over
14 200 marks are registered by the PTO that incorporate “FARMER” or “FARMERS” and are
15 not owned by “Farmers Group.” (*SOF 2*, ¶ 27, *Ex. 17*). Moreover, including Farmers’
16 marks on the Gripe Site is non-commercial, Section (II)(B), *supra*, and Farmers has, in any
17 event, adduced no evidence of actual dilution. As such, FarmersInsuranceGroupSucks.com
18 Admin is entitled to judgment as a matter of law that including Farmers’ marks on the
19 Gripe Site does not dilute these marks.

20 **III. CONCLUSION**

21 FarmersInsuranceGroupSucks.com Admin is entitled to summary judgment against
22 Farmers’ entire Complaint. FarmersInsuranceGroupSucks.com Admin is also entitled to
23 attorneys’ fees and costs incurred in defending this lawsuit.

24
25 DATED this 28th day of November, 2005.

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s/ Peter J. Johnson

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on November 28, 2005, I electronically filed the foregoing
3 with the Clerk of the Court using the CM/ECF System which will send notification of
4 such filing to the following:

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